

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1680

To be argued by
BERT L. GUSRAE

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Respondent,

vs.

MANAGEMENT DYNAMICS, INC., EDWIN BARRETT,
CLYDE GOFF, EPHRAIM HOFFMAN, PETER R.
WATSON, GLOBAL SECURITIES, INC., ALLEN
LANGENAUER, DAVID LANGENAUER, BERNARD
OSCHERS, LEE SCHNEIDER, JOSEPH CIRELLO,
FAIRFIELD SECURITIES, INC., THOMAS F. BRENNAN,
III,

Defendants.

and

WILLIAM N. LEVY, A.J. CARNO, INC., ANTHONY
NADINO, MAYFLOWER SECURITIES, INC. and SAMUEL
D. HODGE,

Defendants-Appellants.

BRIEF OF DEFENDANT-APPELLANT WILLIAM N. LEVY

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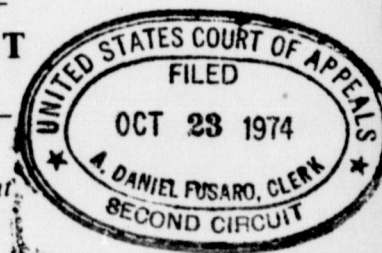


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UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee

V.

MANAGEMENT DYNAMICS, INC., WILLIAM N. LEVY, EDWIN BARRETT, CLYDE GOFF, EPHRAIM HOFFMAN, PETER R. WATSON, GLOBAL SECURITIES, INC., ALLEN LANGENAUER, DAVID LANGENAUER, BERNARD OSCHERS, LEE SCHNEIDER, A.J. CARNO, INC., ANTHONY NADINO, MAYFLOWER SECURITIES, INC., JOSEPH CIRELLO, FAIRFIELD SECURITIES, INC., THOMAS F. BRENNAN III, SAMUEL D. HODGE,

Defendants -

WILLIAM N. LEVY, A.J. CARNO., INC.,
MAYFLOWER SECURITIES, INC., ANTHONY
NADINO, SAMUEL D. HODGE,

Defendant-Appellants.

BRIEF FOR DEFENDANT-APPELLANT WILLIAM N. LEVY

PRELIMINARY STATEMENT

Defendant William N. Levy appeals from the March 29, 1974 decision of Hon. Robert L. Carter, United States District Judge, Southern District of New York, enjoining him, and co-defendants, Carno, Nadino, Mayflower, Cirello and Brennan from violating Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder, in connection with Management Dynamics or any other securities.

The Securities and Exchange Commission initiated this action by filing its Complaint on June 13, 1973. Defendants' motions to dismiss, to compel a more definite statement, to sever and to transfer were denied by the Court on September 28, 1973. A full evidentiary hearing pursuant to the Securities and Exchange Commission's motion for a preliminary injunction was held on October 19th and 23rd, 1973. Levy appeals from the granting of that motion.

STATEMENT OF ISSUES

1. Should the Trial Court have granted a Preliminary Injunction when there was insufficient competent evidence as a matter of law to sustain the finding of the Trial Court that William N. Levy was the "prime architect" or otherwise responsible for the acts complained of?

2. Should the Trial Court have granted a Preliminary Injunction when the August and October letters and press release did not violate the anti-fraud provision of the Securities Act or the Exchange Act as a matter of law?

3. Should the Trial Court have granted a Preliminary Injunction when there was insufficient competent evidence, as a matter of law, to support a finding that Levy violated Sections 5(a) and 5(c) of the Securities Act?

4. Did the Trial Court commit reversible error in admitting hearsay testimony and giving that testimony weight in reaching its decision?

5. Under the facts of this case, was the Commission entitled to a Preliminary Injunction as a matter of law?

STATEMENT OF FACTS

The Governments' witnesses were co-defendants Edwin J. Barrett, Clyde Goff, Effraim Hoffman, David Langenauer, William N. Levy, Thomas Brennan III, Joseph Cirello, Anthony Nadino. Securities and Exchange Commission Investigator Carl Dreyer, Joseph Milano, Vice President of Mayflower Securities, attorney Marc Epstein who was counsel to defendants Levy and Management Dyanmics ("MD"), and Robert Berkson, President of A.J. Carno & Co. Mr. Dreyer was also called as the only defense witness.

Edwin J. Barrett

Edwin J. Barrett testified that he was a professional builder and land developer of many years experience, and was president and Chairman of the Board of defendant MD. He became involved with MD through the offices of his accountant, Norman Weiner and his attorney William Levy (11)*. He had met Mr. Levy in the fall of 1971 through Mr. Weiner and had known Levy for a period of at least seven or eight months

* numerical references are to pages in the Hearing Minutes.

prior to becomming involved in MD. (11-12). During that time he had discussed various things with Mr. Levy. Among them, his desire to operate his business by means of the vehicle of a public company; that he was concerned about taking his own company public, as he felt that would be an expensive and un-doable thing; that he inquired of Levy as to what other ways his company could become a public company. He had specific requirements as to the type of a public company he would be willing to be involved in, in that he would be involved only in a company that had no prior debt of its own, and that was not about to be sued in some way, so as to cause him to expend his capital to defend this company's past problems. (13-16). Levy first told him about MD in approximately June of 1972. (16). Levy told him that MD was a company in which he, Levy, had been involved since its inception, that he knew it very well, and that in knowing it very well, he knew it would fit in the needs or requirements that Barrett had for getting involved with another company. (18). At subsequent meetings, Levy told Barrett more about MD in terms of its debt structure which was Barrett's primary concern, and other peripheral issues such as the number of stockholders and the

fact that the company was trading over-the-counter. (20). Barrett was sufficiently interested in MD to enter into an agreement with the company to put in \$100,000, more or less, of his own assets, and to receive for that, subject to stockholders approval 2.7 million shares, more or less, of the company's stock, that amount of shares being the amount that would put him in control of the company. (21).

Barrett further testified that Levy described the condition of MD on or about the 15th of August 1972 to him as a company whose business activities were nil, whose assets were confined to a small, one acre tract of land in Canada, and whose debt amounted to approximately \$45,000 or \$50,000. (23-24).

There was a stockholders meeting held on September 6, 1972, the purpose of which was to ratify the agreement between Barrett and the company. At that meeting, the number of shares authorized to be issued by the company was increased to eight million. Barrett testified that to the best of his knowledge, the purpose of this increase was to give him 2.7 million shares, which would represent control of the company; and there were approximately 1.3 million shares already outstanding, making a total of approximately 4 million shares,

and the authorization of an additional 4million shares was done at that time, so that in the event there was a possibility to make future acquisitions of other companies or other assets of the companys stock, that the stock would be available and would not require another stockholders meeting to get such approval. (25-26).

The Watson Transaction

Barrett testified that he first heard the name Peter Watson in October 1972, and that that name was mentioned to him by Mr. Levy. Mr. Levy told him that Mr. Watson was an agent for investors and that Watson, for his clients, was interested in making a substantial private placement of approximately 560,000 shares of unregistered MD stock. (27-28). The Board of Directors of MD considered the offer made by Watson, through Levy, the terms of which were to be that MD would issue 560,000 shares of its restricted stock and that that stock be issued without a legend on it and have no printing on it to say that it was restricted stock. (28-29). Mr. Levy, in his capacity as counsel, informed the Board that legends were put on stock for the safety of the company, and were not a legal requirement, and further that the company could protect itself, so long as Watson signed an investment

letter, which stated that he recognized the stock to be restricted. Levy further informed the Board that they were taking some risk, and that risk was described as a possible liability on the part of the company if Mr. Watson acted in an illegal manner; that is, if he took the stock and did not represent it to be restricted stock, and injured some third party. The company, with Mr. Levy's advice, took steps to protect itself from Mr. Watson obtaining possession of the stock and using it in an illegal manner. One such step was not to issue stock in certificates smaller than 5,000 shares. Further, Mr. Levy was to have the shares in his possession until such time as Mr. Watson actually identified his principals and put up the money into an escrow account, and gave the company the time to check out the people who were investing. The shares which were to be presented to Mr. Watson were not the shares which were ultimately to be put into the hands of the investors. That stock was to be put in their name, and therefore, the shares given to Watson would be required to go back to the transfer agent, be cancelled, and new certificates issued. (29-32).

The Board authorized the issuance of the shares in mid-October 1972 in the manner demanded by Mr. Watson. Mr. Levy personally took possession of the shares and flew to

Florida to meet with Mr. Watson. After several days of discussions with Watson in Florida, Levy informed Barrett that there were some small problems as to what would be done physically with the certificates. Levy told Barrett that Watson wanted the shares in his possession so that he could show his clients without identifying them. (32-33). On the third or fourth day after he left, Mr. Levy called Barrett and informed him that he, Levy, was returning to New Jersey. Levy informed Barrett that he had given the shares to Watson to be put in escrow, so that Watson could show the shares to his principals. (33-34).

Barrett testified that the entire transaction was done by the Board of Directors, of which Mr. Levy was a member, that they had discussions back and forth between all the Board members as to how it would be handled, and that Mr. Levy was authorized by them to make the necessary arrangements to complete this private placement. (35.)

Sometime after Mr. Levy's return, he informed Barrett that he had been contacted by Mr. Watson, who wanted the amount of shares increased an additional 400,000 shares. The Board of Directors subsequently authorized this increase and issued the shares in the same manner as the original

560,000. (36).

Barrett testified that the Board authorized Mr. Levy to control this transaction. He was authorized by the Board to cause the shares to be issued and make sure that the delivery was done, and to protect the company and the Board in the way that he was instructed the first time. (37). Subsequently, in approximately the middle of November, when Mr. Watson was not heard from, Mr. Barrett reached Mr. Watson in a hotel in Dallas, Texas, and informed him that he was anxious to find out what was the ultimate disposition of the transaction. Watson informed him that there was some difficulty in terms of getting together with his principal, and that he needed a little more time. Barrett stated that in his judgment, since they had already waited ten days, and since the stakes were rather high, and the benefit to the company would have been very great, it would not hurt to wait another few days. For this reason Barrett agreed to give Watson another week. At the end of that week, close to the end of November, not having heard from Watson, Barrett cancelled the certificates, sent a letter to the transfer agent which said that no stock was to be issued without a legend on it, and without written authorization from the company with the corporate seal, and

signed by the president and secretary (Levy). (39). At the same time, Mr. Levy reported the stock stolen to the F.B.I. in Camden, and asked the S.E.C. to suspend trading of the company's stock until such time as all the shares given to Watson were recovered. (39). All the shares were ultimately returned to MD. The great bulk of them coming back very quickly. All of the shares were returned to MD within five or six weeks of the time that Watson was informed that the deal was cancelled. (40).

The August and October Letters

Mr. Barrett identified a letter on MD stationary dated August 15, 1972, and a letter on MD stationary dated October 25, 1972, to which was attached a press release dated October 13, 1972, which were admitted into evidence as plaintiffs Exhibits 1 and 2, respectively.

On the fifth page of the August letter was a financial statement indicating assets which Barrett contributed to MD. Included in these assets were two options to purchase land. The first was an option to acquire land in Bass River Township, New Jersey. Barrett testified that the option was conditional to the extent that the company had two years in which to obtain governmental approvals; such as zoning, the

environmental protection agency approval to construct a sewer facility and other local state and federal governmental approvals. He further testified that there was no guarantee that such governmental approval could be obtained. (44-45).

Barrett also stated that there was an option to acquire land in Harlesville, Lower Southford Township, Pennsylvania, which was contingent upon the zoning in that area being changed from agricultural to high density residential; high density being defined specifically by the option as ten units per acre. (45-46).

Barrett further stated that he subsequently learned that these mailings of the August and October letters were done by taking the mailing tapes from the transfer agents of all the listed stockholders and sealing them on the face of the envelope and sending them out. Thus the mailings went only to stockholders, and those brokerage houses who were on the stockholders list as holding shares as nominees for their clients. (51). With respect to the October 25th letter and the October 13th Press Release, Barrett testified that two options discussed in the letter are the same options that were discussed in the August letter, and that a third option, to acquire seven hundred acres in Burlington, which was described in the press release, was acquired after Barrett took over MD

and was subject to the local communities' passage of an ordinance permitting the construction of a retirement community as well as the State of New Jersey's permission to erect a sewer treatment plant. Further, the financing for this project would be in excess of twenty five million dollars, and there was no assurance that that amount could be raised. All this information about the third option was contained in the news release. (59-60).

Barrett's Indispensability

In response to a number of plaintiffs' counsels' questions, and over defense counsels' objections for relevancy, Barrett testified that MD has only three full time employees, including himself; that it has had no profits since he had become associated with it, and that he was funding the company with his own funds wherever necessary. (61-65).

Barrett testified on cross examination that the 960,000 shares of MD stock which were given to Watson were never sold (67-68), and had been cancelled on the books of MD. With respect to the Bass River Township, New Jersey option, he testified that the footnote contained a figure of \$1,100, which represented miscellaneous costs spent by him to the date that he gave that option over to MD, and with respect to the second option, a figure of \$4,490, which represented

the net cost of that option. He emphasized these figures reflected cost and not market value of any sort. (69-70).

He further stated that he saw the August letter on or about the time that it was sent out and prior to the mailing of the second letter. (71). He further stated the information obtained from him by the company, which was contained in a written agreement that was dated in July, and was used with his consent to prepare pro forma statements of the August letter, and that MD accountants supplied other material. (72). He continued that the October 25th letter and October 13th press release were prepared by him and were correct to his knowledge at that time. Prior to his mailing these documents, they were discussed with Messrs. Goff and Hoffman, who were Board Members, and with Mr. Levy. (73). Finally, he stated that he was aware that MD was a publicly traded stock at the time all these documents were mailed. On redirect, Barrett testified that prior to the mailing of the October letter, it was shown to Mr. Levy, who suggested changes in the original text, and that its final form reflected Mr. Levy's suggestions. (75-76).

Clyde H. Goff

On direct examination, Goff testified that he was a defendant in the case, and had signed a consent to judgment.

He had been, but no longer was a member of the Board of Directors of MD. (80). He stated that he assented to the issuance of the stock to Mr. Watson because he thought it would be good for the company. (83). He further testified in his statements previously made before the S.E.C. to the effect that he did not exercise any independent judgment on the matter of the increase of the authorized shares to eight million, and was dependant upon the expertise of defendants Levy and Barrett. (88).

Effriam Hoffman

Mr. Hoffman testified that he was a defendant in the action, and had submitted a consent to judgment. He further testified that he was an officer and director of MD, had made an investment in the company, and had been brought in by defendant Levy (92), but that he had exercised his independent judgment in becomming associated with MD. (93). He stated that Mr. Levy represented to him that he, Levy, had control of the company in the summer of 1972 when Hoffman made his \$25,000 investment. (98-99).

Carl Dreyer

Mr. Dreyer is a securities investigator for the United States Securities and Exchange Commission. He testified that he compiled a study of the market prices of MD as

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projected in the pink sheets from August 15th through November 30 1972. (116). Mr. Dreyer further testified that there were ways in which transfers of shares of securities could be made without it going through the company's transfer agent, but that he could not as a fact state that any of these transfers or sales had in fact occurred with regard to the 960,000 shares which had been given to Watson. (132-134).

David Langenauer

Mr. Langenauer testified that he is Vice President of Global Securities, which is an over-the-counter stock-broker located in Plainfield, New Jersey. (155-156). Mr. Langenauer testified that sometime in September of 1972, he attempted to obtain information about MD from Mr. Levy before referring MD stock to his customers, which he did in September of 1972, and that in response to his request for information about the company, the August and October letters were sent to him by Levy, which he in turn sent to some of his customers. (157-159). Langenauer further testified that at the behest of one of his customers he further investigated MD. He spoke to Messrs. Barrett and Levy, and purchased as principal some stock as it became available. (164-165). On Cross Examination Langenauer stated that he conducted an independent investigation of MD, including an investigation of the two options, and

that he did so prior to selling stock to his customers.

(167-168).

William N. Levy

Mr. Levy testified that he was an attorney, admitted to practice in the State of New Jersey. Since 1966 he had prepared nine or ten registration statements. (180). He stated that he presently owned somewhere between 60,000 and 80,000 shares of MD. (193). He prepared and authorized the mailing to shareholders of the August 15th letter. (194). The written portion of the letter was his writing, and was to the best of his knowledge accurate. The footnotes and financial statements were prepared by the company's accountant, Mr. Weiner. (196). He further stated that the October letter and press release were reviewed by him at the behest of Mr. Barrett, that he made various changes and suggestions to him about the wording that Levy had thought was misleading. Some of these were followed, and some were not. On the whole, he was satisfied that it was certainly an acceptable type of letter. (199). The press release of October was issued as soon as was practicable and possible to inform of Mr. Barrett's takeover. (201).

He testified that on August 15th he was the only officer of MD, the others having quit and left. (201). The

purpose of the August 15th letter was to call the September 6th Stockholders Meeting to ratify the agreement between the company and Mr. Barrett. (202.)

He further testified that he did not think there was any danger in processing the Watson shares as he did, as long as the size of the certificate was large enough that any reasonable person, or even an unreasonable person, would check with the transfer agent or with the company. Since the stock was selling at over \$5.00 per share at that time, a five thousand share certificate was \$25,000. There was no doubt in his mind, as he had talked to various transfer agents and other attorneys that any legitimate person would make an inquiry as to the genuineness and validity as to this type of certificate. (208-209). He further stated that Watson represented to him that he was acting only for one person, (211-212), and that Watson never identified his principal to him. (213). Further, Levy testified that he personally handed 560,000 shares of MD stock to Watson in Tampa, Florida, and sent him an additional 400,000 shares through air freight to Dallas, Texas about a week later. (216). He further stated that he requested Watson to return all the shares to him; and received the bulk of them, 910,000 shares, immediately after his request; but that the last 50,000 shares were not

received for three or four weeks thereafter. (216-217).

Further, 200,000 shares of stock had been placed in escrow for safekeeping at a bank in New York, and Levy picked them up there. (220). Levy further testified that he had been told by Mr. Scully that these 200,000 shares had been brought to the bank as potential collateral for a loan, along with a lot of other collateral. (223-224).

Levy testified that to the best of his memory, the final 50,000 shares of MD stock came back in what he characterized as dribs and drabs, most of it by mail, none of it in person. (233) Further, Watson called Levy many times on the phone and told him that he was sending back some more shares. and that Levy would keep getting them in dribs and drabs until he was completely annoyed, because this is the way that Watson was going to pay him back for the inconvenience that Levy had caused him. (237).

Levy's Meeting with Watson

Levy stated that Watson, or a man who claimed to be Watson, met him at the airport and drove him to a motel in Tampa, Florida; that he arrived at night, and Watson had said to him "get some rest and I will call you in the morning". Further, the following morning, Watson called him and took him to a suite of offices which had the name Southern Coast Leasing Corporation on the door, and made various phone calls during which time Levy waited outside his office. He

came out very excited, and said that he had a private placement for the 560,000 shares at what Levy believes was \$1.00 or \$1.10 per share. He stated that he represented a European investor but was dealing through someone in Fort Lauderdale, and it was necessary for him, Watson, to go to Fort Lauderdale immediately to see this person. He got a phone call right in the middle of the conversation, and he asked whether the company would be willing to make a private placement for an additional 400,000 shares in addition to the 560,000 shares at the same price. Levy asked him to wait, upon which Levy called Barrett and told him of the possibility of an additional private placement. While Levy was on the line to Barrett, Barrett called Hoffman and Goff on other lines and after discussing it between them, decided that it would be alright, which fact they communicated to Watson. Watson told Levy that an associate or partner of this undisclosed principal was going to call at Watson's office, shortly thereafter, and that it might be necessary for Levy to go to the transfer agent in New Jersey, pick up the certificates and to come down again and meet them. Watson asked Levy to wait there for a phone call, and then actually to take a plane to New Jersey, pick up the other stock certificates (the additional 400,000 shares) and then come back and meet him at the offices.

In the meantime, he would go to Fort Lauderdale, and he requested the he have the certificates in his hands so that the undisclosed European principal would actually see that Mr. Watson could deliver what he said, which would be

stock certificates of MD. Levy suggested that one certificate might do, or perhaps a letter of authorization, but Watson told him that the people he was dealing with would just not believe that type of proof, the best proof being the certificates themselves. (239-242). Watson explained that the purpose of not having legends on the certificates is that the European principals he represented had various dealings with private placements before in the United States, and that when the time came to remove the legends from the certificates, through an exemption of the S.E.C. or through registration, the transfer agents and the companies themselves would sometimes, probably all the time, he stated, be very reluctant to do so, because their private placements dealt in a large number of shares being freed-up at one time. This would have a very adverse effect upon the trading market. In the European principal's experience, the transfer agent and the company itself always try to delay the freeing-up

of the unregistered stock. This delay would usually result in a law suit that the European principals would have to bring against the company and the transfer agent; and it would take a year, usually two years in Court, and this was something they did not wish to go through again. (242). Further, Levy testified that it had been the arrangement to have Watson's shares returned and then issue new shares in the name of Watson's principal. (243). Levy stated that the purpose of not having a restrictive legend on Watson's certificates was because the European principal insisted upon an exact facimile of the certificates that they were to receive. (244). Finally, Levy testified that he waited at Watson's office for the phone call he was to receive, that he did not actually speak to the principal, but that Mr. Watson's wife, who was acting as his secretary, informed him that the call had been received, and that negotiations had been postponed for another two days because the principals wanted additional information, specifically a copy of the October shareholders letter. (245) Levy subsequently returned to New Jersey. (246).

Levy further stated that after his return from Tampa, he spoke to Watson on the telephone and Watson told him that the European principal had approved the additional

400,000 shares and that it would be a combined 960,000 share private placement for a round number of \$1,000,000; and that Watson told him that he, Watson, would be in Dallas, Texas at the end of the week on another matter, and the shares could be shipped air freight to him in Dallas. Whereupon Levy called Barrett, who then called the other directors and put them on a tie line, and they had a telephone Board Meeting, since they had already agreed that the additional 400,000 share private placement was alright. Levy told them the instructions that Watson had given him, and they said fine and instructed him to go to the transfer agent and give him a letter of authority to get the additional 400,000 shares in the same denominations and in the same circumstances as the original 560,000 shares, and then to mail them air freight to Watson in Dallas. (258-259).

Marc Epstein

Mr. Epstein at the proceedings before the S.E.C. was attorney for MD, defendant Ed Barrett and defendant Levy. At the time of the trial, he was still counsel to MD and Mr Barrett. Counsel stipulated that Mr. Epstein's testimony was that certain receipts were received by MD; that is, Mr. Epstein received certain receipts from Mr. Levy regarding the

shares returned from Watson that the stock was given to Epstein and he received it.

Thomas F. Brennan III

Mr. Brennan testified that he was a registered principal of AMFCO Securities and that at the relevant times he was in charge of the trading department at Fairfield Securities. He testified that at the behest of Allen Langenauer of Global Securities, he checked into MD and began trading in its shares. (290-292).

Joseph J. Cirello

Joseph J. Cirello was a defendant in the action, and a trader at Global Securities. He stated that he never had any contact with MD (309), but that Mr. Langenauer had told him about the company, and that he had never had any contact directly with Mr. Levy. (310). He stated that in his opinion, and from his experience, that all bids and asks of the securities that he had been trading were based solely upon the supply and demand of that stock and absolutely not based upon the management of the company, the profit and loss of the company, or anything to do with the affairs of the company. (312-313). He further stated that he had no idea whether he had ever traded stock that was exempt from registration or otherwise not registered. (314).

Anthony Nadino

Anthony Nadino testified that he was vice president in charge of the trading department at A.J. Carno & Co. He stated that he based the price per share of MD on previous market activity, and not on the affairs or profits of the company. (330).

He stated that sometime from the end of October through the suspension of trading in February, he received one phone call from an individual or broker in California offering to sell a block of 100,000 shares of MD stock to him. He stated that the party who called him did not have a last name and did not have any affiliation with any brokerage firm at that time and identified himself only as Buzz. (333). Over counsel's objection that the substance of the conversation was heresay, Nadino stated that he was speaking to an individual whom he didn't know and had never spoken to before, or after, who introduced himself by the name of Buzz, that this individual asked Nadino for the present market in the stock of MD. Nadino quoted him a price, upon which Buzz asked him if it was a sizeable market. Nadino stated that he could probably perform as well as any of his competitors

in the sheets. "Buzz" revealed to Nadino that he had ultimately 100 000 shares for sale. Nadino stated that he had never traded in that kind of size, and requested that Buzz give him the certificate numbers of the stock. Buzz did so, upon which Nadino contacted the transfer agent. Either Buzz or the transfer agent told Nadino that the name for those particular certificates was P.J. Watson. (337-338). Further, Nadino stated that he believed that the man in California told him that the shares were in 5 000 share units. (340).

Nadino further testified that he received a phone call a couple of days after the stock was suspended from a registered representative of Merrill, Lynch in Florida by the name of Roger Saunders. Over defense objections that this phone call was also heresay, Nadino was allowed to testify that Saunders told him that a client of Saunders had been offered a block of MD stock. (340-341).

On cross examination Nadino testified that he did not actually have knowledge that the phone call he received came from California. He further stated in response to the question of whether it was a practice in the industry for parties to call him saying that they had a large number of

shares of any security to see how firm the market was, that "it is done". (342). Further, that Buzz did not identify himself as Peter Watson, nor did he in fact indicate that he owned the shares in question. (343). Further, Nadino testified that he has no knowledge as to the existence of the certificates in question, that Buzz never made a firm offer to sell the securities to him, or authorized him to sell the securities for any person; that Buzz never gave him his full name, and that he does not know if P.J. Watson or Peter Watson ever existed. He has gotten mysterious calls or inquiries on stock at other times. Competitors of Nadino's test the size of his market by having other brokers come in and make calls, and such practice was usual in the industry. (347-348).

Robert Berkson

he
Robert Berkson testified that/ was president of A.J. Carno & Co., he testified that during the months of September and October 1972 he met with Ed Barrett, William Levy and a Miss Pauline Kirschenbaum, that these people came into his office unannounced and Mr. Levy suggested that he would like to introduce Berkson or A.J. Carno to the new management at MD and to fill them in on any new developments that had occurred. Levy left some printed material about the

company with him. (357-359). Subsequent to that meeting, Berkson testified he spoke with Levy three or four or five times, but could not recall the substance of those conversations, but imagined that Levy inquired as to the price of the stock, that type of thing. (359).

POINT I

THERE IS INSUFFICIENT COMPETENT EVIDENCE AS A MATTER OF LAW TO SUSTAIN THE FINDING OF THE TRIAL COURT THAT WILLIAM N. LEVY WAS THE "PRIME ARCHITECT" OR OTHERWISE RESPONSIBLE FOR THE ACTS COMPLAINED OF.

The Court found that defendant William N. Levy had violated various provisions of the Securities Act and Exchange Act and ordered that a preliminary injunction issue against him.

The theory of the Commission was that there was a single scheme of which Levy was the "prime architect," to cause 960,000 unregistered shares of MD to be issued without restrictive legend, while at the same time creating an artificial market for those shares by issuing statements about the company that were lacking in material information and by manipulating the market price of the shares through the defendant broker-dealers.

The Court adopted this theory, finding throughout its decision that Levy "authorized" or was in some way responsible for each of the acts complained of. Appellant Levy respectfully submits that this finding is contrary to the weight of the evidence presented, and that the Court's findings are clearly erroneous as a matter of law, requiring reversal of the decision and a vacatur of the injunction.

United States. v. United States Gypsum Co. 333 U.S. 364, 92

L.E.D. 746, 68 S. CT. 528 (1948)

A. The August and October Letters and Press Release.

The Commission alleged that these documents omitted certain material information about the company sufficient to constitute a violation of the Anti-fraud provisions of the Securities Act and the Exchange Act. It has been the defendants' position throughout that these documents do not omit any material information, nor in any way violate the law (See Pt. II, *infra*). Of concern here, however, is the Court's finding that Levy had written, signed and authorized the mailing of the August 15th letter and had viewed and had reviewed the October letter and press release prior to their mailing; and, therefore, that he was responsible for their contents and the alleged false impression that they gave. Appellant Levy respectfully submits that he was not "responsible" for the information contained in these documents and further, that the Court's finding that he was is contrary to the weight of the evidence presented.

At the hearing, Barrett, who was the Commission's chief witness, testified that the information contained in the August 15th letter regarding his position with the company, including the information pertaining to the assets that he

was contributing to MD, were supplied by him to the company prior to the making of his July agreement to acquire control of MD. This included all the information concerning the options which have become the center of this controversy. He further stated that this information was used with his consent in the preparation of the proforma statements that were part of the August 15th letter, and that additional material for this letter was supplied by MD's accounting firm. There is no evidence whatsoever that Levy omitted even one item of the information supplied to him by these two sources when he prepared the August letter.

As regards the October letter and press release, Barrett testified that it was he and not Levy who prepared both documents, and that both were correct to his knowledge when mailed. He did state that both were viewed by Levy prior to mailing, and that Levy suggested certain changes in the text which were in fact made. There was no showing what changes Levy suggested, or that these changes resulted in a material omission in the text, or in anyway altered the text in such a way as to be violative of the antifraud provisions of the Securities Acts.

The Court based its finding of Levy's culpability on the theory that his familiarity with the Securities field

made it clear that his action vis a vis the documents could not be inadvertent. The crux of the Commission's complaint however, was that the documents were deficient in that they omitted material information about the options. The Commission took the position that the documents should have more carefully spelled out those contingencies and possible complications which would have or might have presented fulfillment of the company's expectations, because the recipients of the letter "were not necessarily sophisticated in the Real Estate Industry." (Hearing at 56). Appellant Levy submits that he had no expertise whatsoever on these areas of real estate development, and that he necessarily relied upon the information supplied by Barrett who was a qualified expert in this area. He further submits that the Court's reliance upon his familiarity with the brokerage field is misplaced, as he interpreted the term "option" and viewed the information pertaining to the particulars of MD's real estate activities as a layman rather than as an expert.

There is no evidence whatsoever that Levy's actions vis-a-vis these documents were in any way improper. Assuming, arguendo that these documents were in some way deficient there has been no showing that Levy knew of this deficiency, that he used less than the required amount of care in attempting to

to uncover it, or that he was in any way responsible for it. Therefore, as to Levy, the Court's finding that an injunction was necessary and equitable is clearly erroneous and should be vacated.

B. The Watson Transaction

The second phase of the Commission's alleged scheme was the issuance of the 960,000 unregistered shares. The defendant's have urged throughout that this transaction constituted a valid private placement of securities, and was, therefore, exempt from the registration provisions of the Securities Acts, (See PT III, infra.). The Court placed primary responsibility on Levy for this transaction in that it found (1) That it was Levy who first told the Board of Directors of the possibility of placing 560,000 shares through Watson; (2) That the Board relied upon his representations in agreeing to the transaction and authorizing the shares and (3) That Levy had the 400,000 additional shares authorized and delivered to Watson. The evidence is clear that it was Levy who first presented Watson's offer to the board. The other two findings, however, are contrary to the evidence presented.

Barrett testified that the proposed placement was presented to the entire board and discussed fully. Levy was present at those discussions, as he was an officer and director of the

corporation, and also served as its chief counsel. Barrett stated that certain questions were asked and that Mr. Levy's advice and suggestions were sought. It is uncontraverted that, as regards the issuance of the unregistered shares without legend as per Watson's request, Levy's advice to the board was that legends were put on shares for the protection of the corporation and that it was better to have them, but that it was not a legal requirement, and other ways could be taken to protect the company. Levy maintains that this advice was legally correct and warranted under the circumstances. See SEC Securities Act Release No. 4552 (Nov. 6, 1962), wherein the Commission urges, but does not require the use of Restrictive Legends. Levy specifically told the board that they would be taking a risk if Watson acted in an illegal manner. Barrett further testified that he personally relied on Levy's expertise as a legal advisor. Nowhere is there any testimony or other evidence that Levy stated to the Board that he thought the offer was a good one, or that the transaction should be entered into on Watson's conditions. Further, defendant Goff testified that he assented to the transaction because he thought it was for the good of the company.

Barrett further emphasized that the Board had discussions back and forth as to how the matter was to be handled, and

subsequently authorized Levy to make the necessary arrangements to complete the private placement. Levy was acting within the scope of this authority throughout.

As regards the additional 400,000 shares, the testimony is clear that the Board held two meetings via telephone with Levy while he was still in Florida and that the Board, not Levy as the Court found, authorized the additional placement, and that Levy was authorized by the Board to make the necessary arrangements.

In order to further protect itself in this transaction, the Board instructed Levy not to turn the physical possession of the shares over to Watson. Barrett testified that the Board had never retracted nor rescinded this instruction. However, upon his return from Florida when Levy informed Barrett that he had in fact given the shares to Watson, neither Barrett nor any of the Board members protested, nor took any steps to rectify Levy's action. In point of fact, Barrett, knowing that the shares were in Watson's possession and the risks involved, subsequently authorized the issuance of the additional 400 000 shares, and further extended Watson's time to complete the deal. This can only be interpreted as a ratification of Levy's action.

The Court apparently gave no weight to the facts that

Levy had instructed the transfer agent to restrict transfer of the shares, and that it was he who notified the FBI in Camden of Watson's activities. It should thus be apparent that if any criminal purpose existed in the minds of any of the defendants, Levy's actions effectively thwarted them.

C. The Broker-Dealers

The third phase of the alleged scheme was the maintenance of an artificially high market price for MD shares, through the manipulations of the broker-dealers. The record is totally devoid of any connection between Levy and the broker-dealers other than the one meeting with Berkson of A. J. Carno, Inc., which cannot be a sufficient basis for the Commission's allegation of a scheme.

The Commission's theory was that all of the defendant's were involved as aiders and abettors of the scheme. Yet they have totally failed to prove any connection between the various acts complained of. Further, the individual acts with which Levy was connected, devoid of the onus of conspiracy, and not in and of themselves illegal, do not support the Government's argument that an injunction against him is necessary.

POINT II

THE AUGUST AND OCTOBER LETTERS AND PRESS RELEASE DID NOT VIOLATE THE ANTI-FRAUD PROVISIONS OF THE SECURITIES ACT OR THE EXCHANGE ACT AS A MATTER OF LAW.

the

The Court found that/August and October Letters and the October Press Release violated the Ant-fraud provisions, § 17 (a) of the Securities Act and § 10 (b) of the Exchange Act, in that they omitted material facts with respect to the options cited, and further because these communications did not reveal Barrett's indispensibility to the continued existance and operation of MD. The Court also found that Levy's responsibility for these documents was established. That insufficient evidence was presented to justify this latter conclusion has already been discussed (See Pt. I, Supra)

Sections 17(a) and 10(b) are violated when material facts are either not stated or misstated, or when any device or artifice is employed to defraud, or when any act as practiced operates as a fraud upon any person in connection with the sale or purchase of Securities. As regards these documents, therefore, the question presented is whether the information omitted was material.

It is a well established principle that the information which was not disclosed must be material in order for there to be liability for its non disclosure under the anti-fraud

provisions.

Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F. 2d 833 (1968). In the Texas Gulf case the Court stated:

"An insider's duty to disclose information... arises only in 'those situations which are essentially extraordinary in nature and which are reasonably certain to have a substantial effect on the market price of the if (the extraordinary situation) is disclosed.'
Fleischer: Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceeding, 51 Va.L. Rev. 1271, 1289."

The requirement that the undisclosed information be material is one that is easy to define in the abstract, but difficult to determine in a particular case. The Courts have employed a number of formulas, all of which seem to be a different way of saying the same thing. The question of materiality as it relates to possible violation of the anti-fraud provisions of the Securities Act and the Exchange Act has been defined by the U.S. Court of Appeals as:

"the basic test of materiality is whether a reasonable man would attach importance when determining his choice of action in the transaction in question." (Emphasis added.)

SEC v. Texas Gulf Sulphur, supra: List v. Fashion Park, Inc. 340 F. 2d 457, 462; Restatement, Torts, Section 538(2)(a); accord Prosser Torts 554-555; I Hayser &

Jarvis Torts 565-566. Restated another way, a material fact is one

"which would materially effect the judgment of the other party to the transaction." Kardon v. National Gypsum Co., 73F. Supp. at 800 (E.D. 1947).

All of this illustrates that "materiality" in the abstract is a meaningless concept; it can only be given context by considering the question in the context of all the circumstances of the transaction. Information regarding the options, whether positive or negative was not material to the August 15, 1972 shareholder letter. The options, valued at approximately \$5,500 comprised approximately 2.5% of the total assets of MD. This amount hardly seems significant, much less material.

In this regard, perhaps a look at the reporting requirements of the Exchange Act would be of assistance. The Exchange Act requires reports from certain companies (the defendant MD not fitting within such requirements) if within a prescribed period there is, among other things, an acquisition or disposition of more than 15% of the total assets of the Company (See Form 8-K to be filed pursuant to Exchange Act Rule 13a-11 or Rule 15d-11). A 15% change would be significant and material, whereas anything less would not require mention. In the case at bar, the asset in question is

only 2.5% of total. A reasonable investor would not be swayed either way by the mention of the options without a further explanation.

The Court's findings as to the falsehood and misleading nature of MD's October 1972 letter and Press Release are clearly not supported by the facts.

The October 13, Release by MD clearly states:

"The option to buy is subject to the local communities passage of an ordinance that would permit the construction of a retirement community...as well as state of New Jersey permission to erect a sewage treatment plant."

In addition, the release mentions the fact that MD would require substantial mortgage financing.

With regard to the October 25, 1972 shareholder letter, there is a statement:

"However, this is contingent upon the successful achievement of zoning changes permitting such construction. Our application for these changes is now pending, and we expect to receive a yes or no by the end of January, 1973." (Emphasis added.)

Thus the findings of the Court that "No mention was made of the conditions to which effective exercise of the option was subject", that "The indeterminate nature of the option was not disclosed" and that "The October Release failed to indicate that the required approval by Local and

and State Officials might not be given" (Court at 5 App. 122) are clearly erroneous and require reversal.

The same is true of the Courts finding that these communications did not reveal Barrett's indispensability to MD. The August 15th letter clearly states:

Although there can be no assurance that the acquisition of Mr. Barrett's assets will lead to the development of a highly successful company, it is the Board's opinion that not only are Mr. Barrett's assets of solid value to the Company; but, in addition, Mr. Barrett has demonstrated the requisite leadership capability and good business judgment to lead the Company to its anticipated potential of strong and solid growth in both revenues and earnings. (emphasis added)

Although this does not specifically state that Barrett is "indispensible" (a proposition that has never been defined much less established in this case) it does clearly set forth that Barrett is both the financial and personal backbone of the company. It is inconcievable that the Court could require a statement more definite than the one cited. What is more, the specific phrase "Barrett is indispensable to the continued operation of MD" in the August letter would have clearly been improper, as its truth was certainly in question at that time (as it was at the time the second letter was prepared within 6 weeks of Barrett's take over the company) and it could easily have been interpretated as an ultimatum

to the Shareholders to approve Barrett's acquisition, implying that only he could save the company.

The Court also found that the October communications failed to disclose that the company had realized no income or profits since September 1972 and that Barrett had been paid no salary. As both of these documents were prepared during Barrett's first month as head of the company, these allegedly undisclosed facts had yet to be ascertained. Further, appellant again questions the materiality of these omissions and their effect on a potential investor under the previously discussed reasonable man test.

It is thus clear that the material facts which the Court found omitted from the documents in question were in fact not omitted. Further, the Commission failed to put forward any evidence to substantiate the proposition that a reasonable man might have been misled by the documents.

Thus the Court's finding that the August and October letters and the October Press Release violated the anti-fraud provisions of the Securities Acts is clearly erroneous as a matter of law and should be reversed.

POINT III

THERE IS INSUFFICIENT COMPETENT EVIDENCE, AS
A MATTER OF LAW, TO SUPPORT A FINDING THAT LEVY
VIOLATED SECTIONS 5(a) and 5(c) OF THE SECURITIES
ACT.

The Two Sections of the Securities Act (15 USC 77 e)
which the Court found violated by the Watson transaction state:

(a) Unless a registration statement is in effect as
to a security, it shall be unlawful for any person,
directly or indirectly -

(1) to make use of any means or instruments
of transportation or communication in inter-
state commerce or of the mails to sell such
security through the use or medium of any
prospectus or otherwise; or

(2) to carry or cause to be carried through
the mails or in interstate commerce, by any
means or instruments of transportation, any
such security for the purpose of sale or for
delivery after sale.

(c) It shall be unlawful for any person, directly
or indirectly, to make use of any means or instru-
ments of transportation or communication in interstate
commerce or of the mails to offer to sell or offer to
buy through the use or medium of any prospectus or
otherwise any security, unless a registration state-
ment has been filed as to such security, or while the
registration statement is the subject of a refusal
order or stop order of (prior to the effective date of
the registration statement) any public proceeding or
examination under section 77h of this title.

For the Commission to have sustained its burden of
proof of a violation under these sections it is clear that
there would have to be a showing first that a Registration
Statement was required and second that there was a sale of

the unregistered shares to a third party.

Section 4 of the Securities Act, 15 USC 77d, entitled "Exempted Transactions" states, in pertinent part:

"The provisions of Section 5 shall not apply to...
(2) transactions by the issuer not involving a public offering..."

It has been the position of the appellant throughout that the transaction involving the 960,000 shares constituted a private placement and was, therefore, exempt from the provisions of Section 5.

It is apparent from the testimony that all parties to this action, including the Commission, assumed this transaction to be a valid private placement. The transcript is clear that the entire transaction between MD, Watson and Watson's principal was contemplated from the start to be a private placement (81, 208, 210-211, 240-242). The Commission, by virtue of the form of its questions to various witnesses and statements to the Court, recognized and admitted that the transaction constituted a private placement (81, 85, 100, 215, 247, 268). Further, the Court specifically stated that "It has been established that he (Levy) gave Mr. Watson this block of stock for private placement" (268-269). Having so held, it is 'a clearly reversable error for the Court to subsequently find that

Levy violated §§ 5(a) & 5(c) without having put any of the parties to the proof of the issue of a § 4 exemption.

While there have been many recent developments in the area of private placements since the Ralston Purina Case, SEC v. Ralston Purina, 346 U.S. 119 (1953), which is relied on by the Court, the Supreme Court's declaration in that case that "the ultimate test is whether the particular class of persons affected need the protection of the Act" 346 U.S. at 124 is still valid. This is the so called "sophisticated investor" test, which Watson's European principal clearly passes. The uncontraverted testimony is that this undisclosed principal had extensive prior experience in making large private placements of shares in American corporations. It was this prior experience of the principal that led to the condition that no restrictive legend be placed on the certificates. There is absolutely no showing that this prospective offeree needed the protection of the Registration Provisions of the Act.

It further appears that a private placement exemption is available only where a limited number of offerees is involved, SEC v. Continental Tobacco Co. 463 F. 2d 137 (5 th CIR. 1972). In the instant case, the testimony is that Watson was acting for only one principal, certainly a

sufficiently limited number to uphold the exemption.

The Court found that Levy's actions "enabled Watson to offer these shares for purchase to others", and that during the time Watson was in possession of the shares he was "in a position to offer them." The Court emphasized that during the time Watson was in possession of the shares, defendant Nadino at A.J. Carno, received a telephone call from an individual or broker in California regarding MD shares. The individual's name was "Buzz", did not have a last name, requested "what the present market was in (MD) stock, and stated that he had ultimately 100,000 shares", "registered in the name of P.J. Watson." The evidence is clear that this unknown person never made a firm offer to sell MD Securities and never authorized Nadino to sell the Securities for any person. Absent such a firm offer or authorization, it is clear that there can be no violation under these Sections, Chris Craft Industries Inc. v. Piper Aircraft Corp. 480 F. 2d 341 (2nd CIR. 1973); Hill York Corp v. American International Franchises, Inc. 448 F 2d 680 (1971). What is more, the Commission admitted at the hearing that the "gravaman" of its complaint is the possibility that Watson might do something with MD shares. (275 - 76).

The Commission had further charged in its moving

papers that Watson had attempted to pledge 200,000 shares as security for a loan at the Central Cleveland International Bank in New York City, but that the bank had refused to accept the shares as collateral. The only evidence presented of this transaction, was the hearsay testimony indicating that Levy was told by a Mr. Scully, a bank officer, that an unnamed person brought MD shares to the bank as "potential collateral" for a loan (223-224). Neither Mr. Scully, nor anyone else, testified that, in fact, any shares of MD were ever pledged or otherwise used as collateral for a loan at any bank.

Further, it was the testimony of Dreyer, the Commission's investigator and expert witness that, although there were several ways a transfer amounting to a sale of the Watson shares could have taken place, there was no evidence revealed by his investigation that any such transfer actually occurred.

In short, the Commission failed to sustain its burden of prove by showing that a violative sale or offer actually took place.

It is thus clear that the issuance of the 960,000 shares to Watson was a valid private placement and, therefore, exempt from the Registration Provisions of the Securities Act,

and further that the Courts' conclusion to the contrary, after adopting this position at the hearing, was clearly erroneous and therefore requires reversal.

POINT IV

THE COURT COMMITTED REVERSABLE ERROR IN ADMITTING
HEARSAY TESTIMONY AND GIVING THAT TESTIMONY WEIGHT
IN REACHING ITS DECISION

On two occasions during the hearing, the Court admitted into evidence, over timely defense objections, declarations by third parties which were clearly inadmissible hearsay.

The first such declaration, which was brought out on Levy's direct examination, was the transaction between Mr. Scully, an officer of the Central Cleveland International Bank of New York, and an unnamed third party, other than Peter Watson, whereby this party allegedly brought 200,000 shares of MD stock to the bank, along with a lot of other collateral as potential collateral for a loan. Neither Mr. Scully nor this unnamed third person were called upon to testify to this transaction and thus neither were subject to cross-examination. Instead, the Court permitted the Commission to adduce proof of this transaction through Levy, who knew only what he had been told by Scully.

The second such declaration was the conversation between Nadino and "Buzz". The Court permitted Nadino to repeat the substance of "Buzz's" statements although this person was not available for cross-examination. What is more,

the basis for the Court's allowing the substance of this conversation into evidence was the fact that the Court had "found" at that point, that "some of the stock was pledged or was collateral in a New York Bank," (336) Thus, This hearsay declaration was permitted because of the foundation laid by the previous hearsay declaration: That being the only evidence presented of any "pledge" of any MD shares.

There can be no question that both of these declarations were hearsay. Both were statements that were made out of Court and were offered as proof of the facts asserted therein. Uniform Rules of Evidence, Rule 63. In neither instance did the defendants have the opportunity to cross-examine the person who made the statements Wigmore, Evidence §§ 1361, 1362. Clearly both were unadmissable in a Court of Law, in a civil action, and the Court was in error in admitting this testimony, Richardson on Evidence, 9th Ed. §206.

Furthemore, the Court, in rendering its opinion, concluded that the defendants had violated Sections 5(a) and 5(c) of the Securities Act because "Inquiry was made of Carno for sale of 100,000 of these shares and 200,000 were in escrow at the Central Cleveland Bank." (Court at 12, App.129.) As previously stated, the two hearsay statements were the only references to these two alleged transactions in the record

(See Pt. III, Supra.). It thus appears that the Court used incompetant evidence to make essential findings which would not otherwise have been made and to reach its ultimate conclusion. The Court's decision being thus tainted by this incompetent and prejudicial evidences a reversal is clearly mandated Grandin Grain & Steel Co. v. U.S. 170 F 2d. 425 (1948).

POINT V

THE COMMISSION WAS NOT ENTITLED TO A PRELIMINARY
INJUNCTION AS A MATTER OF LAW.

It is well documented that a preliminary injunction is an extraordinary remedy and that the party seeking it must meet a stringent burden of proof to show the propriety and necessity of this relief.

It has been appellant Levy's contention throughout that the Commission failed to establish its burden of proof by showing that a preliminary injunction was a proper and necessary remedy against him.

In the case of Securities and Exchange Commission v. Stock Market Finance, Inc. (DC NY, 1936); CCH, Fed. Sec. Law Rep, par.90,105, the Court held that the essential factors to obtain an injunction pendente lite are: (1) The imminence of danger, (2) Probable success on the merits and (3) Sufficiency of the moving papers. The Courts attention is drawn to the wide variance between the Commission's moving papers, which were drafted after its investigation, which included testimony by most of those who testified at the hearing, and the actual proof as adduced at the hearing. While the moving papers may appear sufficient on their face, it is clear that they set forth many unwarranted conclusions in light of the

evidence at the hearing. The cases of Securities and Exchange Comm. v. Lum's (SDNY. 1973), CCH Fed. SEC. L. Rep. 1P 94,134, Gulf and Western Industries, Inc. v. Great Atlantic and Pacific Tea Co., 356 F. Supp. 1066, Affd 476 F. 2d 687 (1973) and Sonesta International Hotels Corp. v. Wellington Associates, (2nd CIR. 1973), CCH Fed. Sec. L. Rep. par. 94,041 are equally supportive of the proposition that the moving party must show probable success on the merits to the extent acts in violation of the Federal Securities Acts must be clearly evident from the moving papers and supporting evidence, and that a preliminary injunction is necessary to prevent irreparable harm and is in the public interest.

The Commission based its motion for a preliminary injunction on the ground that Appellant Levy had violated Sections 5(a) and 5(c) and Section 17(a) of the Securities Act of 1933 and Section 10(b) and Rule 10-b-5 under the Securities and Exchange Act of 1934. Appellant Levy respectfully submits that he has shown herein that the activities complained of were in no way violative of these statutes. (See Points II and III, Supra) and therefore the Commission's request for injunctive relief in general is without basis or merit.

Furthermore, Appellant Levy submits that the

Commission, despite its initial assertion that he was the "prime architect" of an alleged scheme, failed to show that he was responsible for any of the acts complained of or that he personally violated the law. (See Pt I, Supra). Thus injunctive relief against him, individually, is clearly improper.

In Gulf and Western v. Great A & P Tea Co., Supra, the Court held that a party seeking an injunction must not only demonstrate a probability of success on the merits, but must also show that a balance of the equities in terms of injury to the public interest if the injunction were denied, as against injury to the defendant if it were granted, weighs heavily on the side of an injunction.

In balancing the equities, the District Court must consider the issue of whether "in view of past Securities violations there is a reasonable **likelihood that the wrong will be repeated**" SEC v. Manor Nursing Centers, Inc., 458 F 2d 1082 (1972). In this case the stock of MD was suspended from trading on December 8, 1972 and has not been reactivated to date. In light of this and the Commission failure to establish the substantive allegations of its complaint, the Commission clearly failed to show that such a reasonable **likelihood existed**.

Additionally there is the fact that Appellant Levy is an attorney. As a rule, Courts have been reluctant to grant injunctions against attorneys with the factors similar to those before this Court. In the case of Securities and Exchange Commission v. International Camera-Carder Corporation et al. CCH Federal Securities Law Reporter, Para. 91,666 (1966), Justice Cannella denied the Commission's request for an injunction against an attorney, since the attorney indicated that he had no intention of attempting to offer for sale to the public any securities of the company in question.

In the case of Securities and Exchange Commission v. Torr 87 F. 2nd 446, the court stated:

"As the appellants (defendants) were not engaged in any such acts or practices and the circumstances failed to support any reasonable inference that they were about to engage in any at the time the suit was brought or at the time the injunction was made effective, we are constrained to hold that it was improvidently granted." See Cutten v. Wallace 80 F. 2nd 140.

See also S.E.C. v. Frank, 388 F 2d 486 (1968) wherein this circuit expressed its reluctance to enjoin an attorney absent a clear showing of wrongdoing and an immediate necessity to enjoin him.

The equities in this case weigh extremely heavily in favor of the defendant Levy and in support of his position that an injunction should have been denied.

CONCLUSION

For all of the foregoing reasons, the Court's Order of a Preliminary Injunction against Appellant William N. Levy should be reversed and the Injunction vacated.

Dated: New York, New York
August 12, 1974

Respectfully submitted,

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Research Assistant: Irwin G. Stein

CERTIFICATE OF SERVICE

The undersigned, an attorney duly admitted to practice before this Court, certifies that on the 12th day of August, 1974, he caused a true copy of the foregoing BRIEF FOR DEFENDANT-APPELLANT WILLIAM N. LEVY, to be served on the following individuals, by enclosing same in postage prepaid envelopes and depositing them in the United States Mails:


Dan Bresher, Esq.
attorney for defendant-appellant
Samuel Hodge
230 Park Avenue
New York, New York 10017

Borden & Ball, Esqs.
attorneys for defendant-appellant
Mayflower Securities, Inc.
345 Park Avenue, New York, New York 10022

Feldshuh & Frank, Esqs.
attorneys for defendants-appellants
A.J. Carno, Inc. and Anthony Nadino
144 East 44th Street
New York, New York 10017

Frederick L. White, Esq.
Securities and Exchange Commission
Office of the General Counsel
500 North Capitol Street, N.W.
Washington, D.C. 20549

Dated: New York, New York
August 12, 1974


BERT L. GUSRAE

U S COURT OF APPEALS: SECOND CIRCUIT

SEC,

Plaintiff-Respondent.

against

DYNAMICS, INC.

Defendants-

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, James Steele,

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 23rd day of October 1974 at *

deponent served the annexed

Appellant Brief

upon

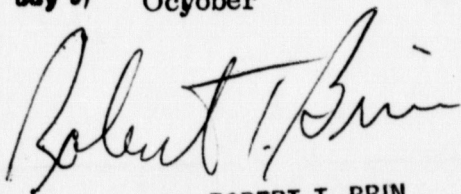
*

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attornev(s) herein,

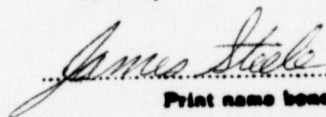
Sworn to before me, this 23

day of October

19 74



ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0410050
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975



Print name beneath signature

JAMES STEELE

- * Dan Bresher-230 Park Ave., New York
- * Borden & Ball- 345 Park Ave., New York
- * Feldshuh & Frank, 144 E. 44th St., New York

CERTIFICATE OF SERVICE

The undersigned, an attorney duly admitted to practice before this Court, certifies that on the 12th day of August, 1974, he caused a true copy of the foregoing BRIEF FOR DEFENDANT-APPELLANT WILLIAM N. LEVY, to be served on the following individuals, by enclosing same in postage prepaid envelopes and depositing them in the United States Mails:


Dan Bresher, Esq.
attorney for defendant-appellant
Samuel Hodge
230 Park Avenue
New York, New York 10017

Borden & Ball, Esqs.
attorneys for defendant-appellant
Mayflower Securities, Inc.
345 Park Avenue, New York, New York 10022

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A.J. Carno, Inc. and Anthony Nadino
144 East 44th Street
New York, New York 10017

Frederick L. White, Esq.
Securities and Exchange Commission
Office of the General Counsel
500 North Capitol Street, N.W.
Washington, D.C. 20549

Dated: New York, New York
August 12, 1974


BERT L. GUSRAE

US COURT OF APPEALS: SECOND CIRCUIT
Index No.

SEC,

Plaintiff-Respondent

against

DYNAMICS, INC,
Defendants

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

I, Karen Giles,

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

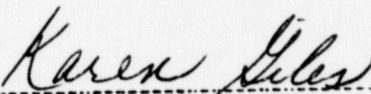
1013 East 180th Street, Bronx, New York

That upon the 23 day of October 1974, deponent served the annexed Appellant's Brief

upon Frederick L. White

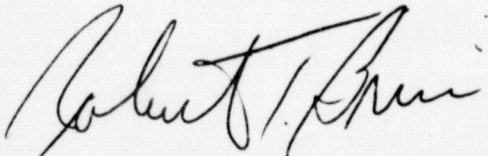
attorney(s) for

in this action, at 500 North Capitol St., Wash. D.C. 20549

the address designated by said attorney(s) for that purpose by depositing ² a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.Sworn to before me, this 23
day of October 1974

Print name beneath signature

KAREN GILES

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0410950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

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